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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHERRY MICHELLE DESROSIERS,

Defendant and Appellant.

G032792

(Super. Ct. No. 01NF3390)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Reversed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lilia E. Garcia, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted Sherry Desrosiers of second degree murder for killing her husband, Danny Desrosiers (Danny),¹ and found the allegation she personally used a firearm causing death to be true. The trial court sentenced defendant to 15 years to life for the murder count and imposed the mandatory, consecutive 25 years to life term for the firearm enhancement. (Pen. Code, § 12022.53, subd. (d).) Defendant argues the trial court erred in excluding the victim's toxicology report and expert testimony concerning the behavioral effects of severe methamphetamine intoxication. She further claims her sentence constitutes cruel and unusual punishment under the Eighth Amendment and under article I, section 17 of the California Constitution. We need not reach the sentencing issue because we agree the evidentiary exclusions require reversal.

I

FACTS

In December of 2001, Buena Park Police Officer Pat Carney responded to a call from a neighbor who reported hearing a woman yelling and a gunshot from a nearby residence. Carney spotted Danny's body lying outside of the house. From his vantage point, he observed defendant open the side door of the residence and drop a black pouch on the body. The pouch was later determined to contain 4.28 grams of methamphetamine and a check cashing card in Danny's name. Police retrieved a 12-gauge shotgun propped outside the front door of the house. The gun's safety was off, the bolt was closed, and the chamber contained a single expended cartridge. Officers arrested defendant at the scene.

Later that morning, detectives interviewed defendant. After waiving her *Miranda* rights, she told a sordid tale. She recalled a young man and his 16-year-old girlfriend visiting her husband before she went to bed. Around 2:00 a.m., she awoke to

¹ We use the victim's first name to avoid confusion and intend no disrespect. (See *Nairne v. Jessop-Humblet* (2002) 101 Cal.App.4th 1124, 1126, fn. 1.)

use the bathroom. Hearing voices in the living room, she walked in to discover the girlfriend orally copulating her husband while he watched a pornographic tape.

Defendant became extremely upset. Danny's infidelity on at least four previous occasions, including the preceding night when defendant caught him with a different girl, exacerbated her reaction. She had ignored his perfidy the night before, but this time erupted — pulling the girl's hair and striking Danny in the face. She yelled at the young man and woman to “get the fuck out” of her house.

Defendant's nine-year-old daughter suddenly appeared in the living room, complaining of a nightmare. Defendant took the child into the bedroom and comforted her for about 15 minutes. Alerted by a knock at the front door, she returned to the living room to find the young man and his girlfriend back in her home. She angrily instructed them to leave and this time told Danny to leave also. The young man and woman left, but Danny refused her repeated commands.

Defendant retrieved a shotgun from the bedroom and loaded it. She pointed the gun at her husband and threatened to shoot him if he did not leave. Danny put his hands in the air and backed out of the house, but did not take defendant's threats seriously. Instead, he taunted her and called her names. The two ended up outside, with defendant yelling at Danny to collect his shoes and keys and leave — only to be met with more insults. Danny spat out, “I'll do whatever the fuck I please. You're just gonna have to deal with it, bitch.” Defendant aimed the shotgun at his chest, apologized to him, and fired the weapon. She saw his chest “explode[,]” called 911, and placed the shotgun outside the front door. Defendant told investigating officers she had purposely pulled the trigger but did not intend to kill Danny, claiming he “made me kill him.” An autopsy revealed Danny bled to death from a severed artery in his right shoulder.

II

DISCUSSION

Excluding the Toxicology Report and Drug Expert Testimony Was Prejudicial Error

A. Procedural Background

Defendant contends the trial court erred when it refused to admit evidence of the alcohol, methamphetamine, and amphetamine levels in Danny's blood at the time of death. She argues the evidence was necessary to corroborate her version of Danny's behavior, including his "week of sleeplessness, his sex with a minor and his fearlessness in the face of the shotgun, walking directly into it and walking outside shoeless" on a cold night. She proffered defense experts who "were prepared to testify that the symptoms of methamphetamine intoxication include grandiosity and feelings of invincibility, reckless and irrational behavior, and misperceptions of heat and cold."

The trial court denied admission of the toxicology report and expert testimony on three separate occasions. Pretrial, the court rejected defense counsel's corroboration rationale, but invited defense counsel to renew the request if events at trial made the evidence relevant. During defendant's cross-examination, the prosecutor attacked defendant's testimony that Danny "was backing you out of the house," noting she did not divulge this detail in her police interview. The prosecutor challenged defendant, "It never happened, did it, Ma'am?" Defendant insisted, "Yes, it did." After defendant completed her testimony, defense counsel asked the court to reconsider its earlier exclusion of the toxicology report and expert testimony, but the court refused, concluding the victim's behavior "doesn't seem to be in dispute"

In her closing argument, the prosecutor's core strategy was to dismantle defendant's credibility: "Do you really think that the defense in this case is being straight

with you? The defendant in this case wasn't straight with you when she got on the stand and testified." ". . . I believe, ladies and gentlemen, that you are fully entitled to say, 'Well, wait a minute. This defendant expresses upset [in the 911 call reporting the killing]. She says she misses this victim. But has this defendant really been completely candid with me? Has she really lived up to her oath in this courtroom to tell me the truth, the whole truth and nothing but the truth?' Because I submit to you, ladies and gentlemen, the answer is no, she really didn't."

The prosecutor pointedly challenged defendant's version of their final quarrel, disputing defendant's claim Danny walked toward her angrily as she held the weapon on him, forcing her to retreat in a lengthy, tense march. "[Y]ou heard the defendant when she . . . indicated that the victim was sort of backing her through the course, backing her to where she ended up. . . . [¶] I think you'll have a chance to ask yourselves, ladies and gentlemen, is that even a believable, credible claim that somebody holding a loaded shotgun moved as she must have moved through her house based upon her testimony like this [pointing to diagram], and then like this, and then somehow like this all the way over toward the rear gate? By somebody who didn't have any weapon whatsoever? No, it doesn't even really make sense when you think about it analytically or critically."

Following closing arguments and submission of the case to the jury, the jury sent a note to the court inquiring, "Was the victim on autopsy found to be under the influence of drug[s] or/and alcohol. If so[,] what levels of each?" Defense counsel moved to reopen its case to present the toxicology report and corresponding expert testimony. The defense argued the corroborative nature of the evidence was crucial, since defendant's heat of passion defense turned on a credible account of the shooting.

As defense counsel phrased it, “is her statement that he walked her out the door with her backing up, even though she had a gun on him . . . is that a lie by her, as the People have suggested to the jury, or a fact that is consistent with the reckless behavior of a person high on methamphetamine? Did he go outside the house to be found on a very cold night with no shoes because Ms. Desrosiers forced him outside the house, thereby . . . proving her premeditated deliberation, or did he go outside without his shoes because of the recklessness and grandiosity [or] lack of perception of heat and cold from extremely high methamphetamine levels.”

Defense counsel pointed out that, depending on its assessment of defendant’s credibility, the jury would determine whether the victim acted “consistent with the testimony of Ms. Desrosiers . . . or consistent [with] Ms. Carlisle-Raines’ theory, [in which] Ms. Desrosiers’ statements [were] lies” But the trial court concluded that, because defendant relied on heat of passion as her defense, the “state of mind [or] sobriety of the *victim* [was] irrelevant.” (Italics added.) The court therefore denied the defense’s motion to reopen and instructed the jury: “The levels of alcohol and/or drugs in the decedent’s blood were not introduced into evidence. Do not speculate as to either matter.”

B. Admissibility of Corroborating Evidence

The Attorney General argues defendant’s proffered intoxication evidence and expert testimony was properly excluded because “the alleged *reason* for Danny’s actions that night was not relevant to” whether “*she* subjectively and objectively acted in the heat of passion” (Original italics.) (See *People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253 [to establish heat of passion defense, defendant must kill in the thrall of

intense emotions under circumstances that would arouse passions of an ordinary, reasonable person].)

Our review of the record discloses a false premise. The evidence was not offered in direct support of defendant's heat of passion defense, as the Attorney General supposes, but rather to rehabilitate her credibility after the prosecution's withering attack.² Evidence Code section 780 provides that the "jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing" (Accord *People v. Jones* (1984) 155 Cal.App.3d 153, 178 [quoting statute]; see, e.g., *People v. Morgan* (1997) 58 Cal.App.4th 1210, 11215-1216 [expert witness testimony regarding battered woman's syndrome properly used to restore witness's credibility].)

Here, the prosecutor attempted to discredit defendant's testimony "that your husband was backing you out of the house while you held a gun" She accused defendant of lying ("It never happened, did it, Ma'am?"), and urged the jury in closing to disbelieve defendant because "it doesn't even really make sense when you think about it analytically or critically." In other words, defendant was clearly lying because no sane person would walk into the "business end" of a shotgun, let alone with the recklessly insulting bravura she claimed Danny exhibited. But as defense counsel explained, the excluded evidence would have shown Danny was acting "on extremely high levels of methamphetamine" and that the symptoms of such "methamphetamine intoxication

² We express no opinion on the admissibility of the evidence had it been offered as direct evidence of defendant's heat of passion. It may be that, subjectively and objectively, a person's emotional response to a spouse's bizarre behavior might differ depending on knowledge that the spouse was sober or that the behavior was caused, say, by a brain tumor or by severe intoxication. But here the defendant did not suggest Danny's intoxication itself had any effect on her mental state, only his outward behavior.

includ[e] grandiosity, reckless behavior, irrational behavior, [and] feelings of invincibility.” In sum, defendant had evidence and experts literally waiting in the hallway that would have directly rebutted the attack on her credibility, and she should have been allowed to present it. (See *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 809 [evidence is admissible if it will assist the defense, even without assurance of exoneration].)

C. Prejudice

The error in excluding the evidence requires reversal because it was prejudicial. (See Cal. Const., art. VI, § 13.) Defendant’s heat of passion defense turned on the credibility of her subjective state of mind and whether her account of the objective events was trustworthy. (*People v. Steele, supra*, 27 Cal.4th at pp. 1252-1253.) CALJIC No. 2.20 instructed the jury that a witness’s believability turns on “[t]he existence or nonexistence of any fact testified to by the witness” (Evid. Code, § 780.) The prosecutor relentlessly attacked defendant’s believability in closing argument, and made what she considered the incredible story about Danny “backing [her] out of the house” a linchpin among reasons to reject defendant’s heat of passion claim.

Defendant’s inability to rebut the charge she was lying was particularly damaging since she was the only witness to Danny’s extreme behavior during their final confrontation. The minor admitted she orally copulated Danny and that defendant became enraged at this discovery, but to counter the prosecution’s theory defendant sufficiently cooled off in the period she comforted her daughter, the defense sought to show Danny’s irrational and emotionally wrought response pushed defendant over the edge. Whether the jury believed Danny faced down the barrel of a gun and advanced upon her hurling insults in a final heated quarrel depended on defendant’s credibility,

which the prosecution severely damaged with claims of wild improbability. The erroneous exclusion of defendant's intoxication evidence and expert testimony prevented the jury from considering the only evidence corroborating her account of the homicide. Because there is a reasonable probability defendant would have obtained a more favorable result had the jury considered this critical evidence, we conclude the error was prejudicial and requires reversal.

III

DISPOSITION

The judgment is reversed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.